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9
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11 **UNITED STATES DISTRICT COURT FOR THE**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 Center for Food Safety, *et al.*,

15 Plaintiffs,

16 v.

17 Thomas J. Vilsack, *et al.*,

18 Defendants.
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Case No. CV 10-04038 JSW

**DEFENDANTS' ANSWER TO
PLAINTIFFS' COMPLAINT**

Judge: Honorable Jeffrey S. White
Place: Courtroom 11

1 Defendants Thomas J. Vilsack, in his official capacity as Secretary of the United States
2 Department of Agriculture (“USDA”), the USDA, and the Animal and Plant Health Inspection
3 Service (“APHIS”) hereby answer the Plaintiffs’ Complaint as follows:

4 RESPONSES TO INDIVIDUAL AVERMENTS

5 In response to the correspondingly numbered paragraphs of the Complaint, Defendants
6 state as follows:

7
8 1. The first sentence sets forth Plaintiffs’ characterization of the nature and basis of
9 their lawsuit to which no response is required. Defendants deny the second sentence.

10 2. Defendants deny the allegations in the first sentence as vague because Plaintiffs
11 do not clarify what environmental effects they allege to be well documented. Defendants deny
12 the allegations in the second and third sentences. The allegations in the fourth sentence
13 characterize unnamed studies, which speak for themselves and are the best evidence of their
14 content. Defendants deny any characterization that is inconsistent with the referenced studies.
15 Defendants deny the allegations in the fifth sentence and aver that there is no risk of cross-
16 pollination from the planting of the Roundup Ready Sugar Beet (“RRSB”) steckling authorized
17 by the permits because the permits do not authorize the flowering of the stecklings. Defendants
18 deny the allegations in the sixth sentence and aver that the permits do not allow seed production
19 and only allow the planting of the RRSB stecklings subject to strict permit conditions designed
20 to prevent RRSB from being commingled with non-genetically engineered material.

21
22 3. The allegations in the first sentence characterize unnamed studies, which speak
23 for themselves and are the best evidence of their content. Defendants deny any characterization
24 that is not consistent with referenced studies. Defendants aver that the cultivation of RRSB may
25 result in an increase in the use of Roundup for sugar beet production, but it also may result in a
26 decrease in the use of more toxic herbicides. Defendants deny the allegations in the second
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1 sentence and aver that Roundup in certain formulations may contain chemicals that can be
2 harmful if used improperly. Defendants deny the allegations in the third, fourth, and fifth
3 sentences.

4 4. Defendants deny the first sentence and aver that APHIS issued four permits for
5 planting of RRSB seed for steckling production (not seed production) on September 3, 2010, and
6 APHIS is currently considering a request by Monsanto for partial deregulation or other
7 administrative action to allow future planting of RRSB. Defendants deny the second, third,
8 fourth and fifth sentences.

10 5. This paragraph sets forth Plaintiffs' characterization of the nature and basis of
11 their lawsuit to which no response is required. To the extent a response is required, Defendants
12 deny that any violations of law have occurred and deny that Plaintiffs are entitled to any of the
13 relief requested or to any other relief whatsoever.

15 6. The allegations in paragraph 6 are legal conclusions, to which no response is
16 required.

17 7. Defendants deny the allegations in this paragraph.

18 8. Defendants deny the allegations in this paragraph.

19 9. The first sentence sets forth Plaintiffs' characterization of the nature and basis of
20 their lawsuit to which no response is required. Defendants lack knowledge or information
21 sufficient to form a response as to the allegations in the second sentence and therefore deny the
22 allegations. Defendants deny the allegations in the third sentence.

24 10. Defendants lack sufficient information on which to either admit or deny the
25 allegations contained in this paragraph and therefore deny the allegations.

26 11. Defendants lack sufficient information on which to either admit or deny the
27 allegations contained in this paragraph and therefore deny the allegations.
28

1 12. Defendants lack sufficient information on which to either admit or deny the
2 allegations contained in this paragraph and therefore deny the allegations.

3 13. Defendants deny the allegations in the first and second sentences. Defendants lack
4 sufficient information on which to either admit or deny the allegations contained in the third and
5 fourth sentences and therefore deny the allegations. Defendants deny the allegations contained
6 in the fifth sentence. Defendants deny the allegations in the sixth sentence and aver that the
7 cultivation of RRSB may result in an increase in the use of Roundup for sugar beet production,
8 but it also may result in a decrease in the use of more toxic herbicides. Defendants deny the
9 allegations in the seventh sentence.

10 14. Defendants lack sufficient information on which to either admit or deny the
11 allegations contained in the first sentence and therefore deny the allegations. Defendants deny
12 the allegations in the second sentence.

13 15. Defendants deny the allegations in this paragraph.

14 16. The first sentence sets forth Plaintiffs' characterization of the nature and basis of
15 their lawsuit to which no response is required. Defendants deny the second sentence. Defendants
16 lack sufficient information on which to either admit or deny the allegations contained in the
17 remainder of the paragraph and therefore deny the allegations.

18 17. Defendants lack sufficient information on which to either admit or deny the
19 allegations contained in the first sentence and therefore deny the allegations. Defendants deny
20 the allegations in second and third sentences.

21 18. Defendants deny the allegations in this paragraph.

22 19. The first sentence sets forth Plaintiffs' characterization of the nature and basis of
23 their lawsuit to which no response is required. Defendants deny the allegations in the second
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1 sentence. Defendants lack sufficient information to either admit or deny the allegations contained
2 in the third and fourth sentences and therefore deny the allegations.

3 20. Defendants lack sufficient information on which to either admit or deny the
4 allegations contained in this paragraph and therefore deny the allegations.

5 21. Defendants deny the allegations in the first sentence. Defendants deny that Sierra
6 Club members will be injured by the challenged action, and otherwise Defendants lack sufficient
7 information on which to either admit or deny the remainder of the paragraph and therefore deny
8 the allegations.

9 22. Defendants deny the allegations in this paragraph.

10 23. The first sentence sets forth Plaintiffs' characterization of the nature and basis of
11 their lawsuit to which no response is required. Defendants lack sufficient information on which
12 to either admit or deny the remaining allegations contained in this paragraph and therefore deny
13 the allegations.

14 24. Defendants lack sufficient information on which to either admit or deny the
15 allegations contained in this paragraph and therefore deny the allegations.

16 25. Defendants lack sufficient information on which to either admit or deny the
17 allegations in the first sentence and therefore deny the allegations. Defendants deny the
18 remaining allegations.

19 26. Defendants deny the allegations in this paragraph.

20 27. Defendants admit the allegations contained in the first sentence. Defendants
21 admit that APHIS issued permits on September 3, 2010, for the planting of RRSB seed for
22 steckling production and deny the remaining allegations in the second sentence. Defendants
23 deny the allegations contained in the third sentence and aver that APHIS is an agency within
24 USDA, but the authority to act under the PPA is delegated to APHIS.

1 28. The allegations in this paragraph characterize the National Environmental Policy
2 Act (“NEPA”), 42 U.S.C. § 4331 *et seq.*, the Council on Environmental Quality’s (“CEQ”)
3 regulations implementing NEPA, 40 C.F.R. § 1500 *et seq.*, and a cited court opinion, which
4 speak for themselves and are the best evidence of their content. Defendants deny any
5 characterization that is not consistent with referenced statute, regulations, and court opinion.
6

7 29. The allegations in this paragraph contain characterization of NEPA and CEQ’s
8 regulations implementing NEPA, which speak for themselves and are the best evidence of their
9 content. Defendants deny any characterization that is not consistent with the statute and
10 regulations.
11

12 30. The allegations in this paragraph contain characterization of CEQ’s regulations
13 implementing NEPA, which speak for themselves and are the best evidence of their content.
14 Defendants deny any characterization that is not consistent with the regulations.

15 31. The allegations in this paragraph contain characterization of CEQ’s regulations
16 implementing NEPA, which speak for themselves and are the best evidence of their content.
17 Defendants deny any characterization that is not consistent with the regulations.

18 32. The allegations in this paragraph contain characterization of CEQ’s regulations
19 implementing NEPA, which speak for themselves and are the best evidence of their content.
20 Defendants deny any characterization that is not consistent with the regulations.
21

22 33. The allegations in this paragraph contain characterization of NEPA and CEQ’s
23 regulations implementing NEPA, which speak for themselves and are the best evidence of their
24 content. Defendants deny any characterization that is not consistent with the statute and
25 regulations.
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1 34. The allegations in this paragraph contain characterization of CEQ's regulations
2 implementing NEPA, which speak for themselves and are the best evidence of their content.
3 Defendants deny any characterization that is not consistent with the regulations.

4 35. The allegations in this paragraph contain characterization of NEPA and CEQ's
5 regulations implementing NEPA, which speak for themselves and are the best evidence of their
6 content. Defendants deny any characterization that is not consistent with the statute and
7 regulations.

8
9 36. The allegations in this paragraph contain characterization of CEQ's regulations
10 implementing NEPA, which speak for themselves and are the best evidence of their content.
11 Defendants deny any characterization that is not consistent with the regulations.

12 37. The allegations in this paragraph characterize APHIS' NEPA implementation
13 regulations, which speak for themselves and are the best evidence of their content. Defendants
14 deny any characterization that is not consistent with the regulations.

15
16 38. The allegations in this paragraph characterize APHIS' NEPA implementation
17 regulations, which speak for themselves and are the best evidence of their content. Defendants
18 deny any characterization that is not consistent with the regulations.

19 39. The allegations in this paragraph characterize APHIS' NEPA implementation
20 regulations and a final rule published in the Federal Register, which speak for themselves and are
21 the best evidence of their content. Defendants deny any characterization that is not consistent
22 with the referenced regulations and Federal Register citation.

23
24 40. The allegations in this paragraph characterize APHIS' NEPA implementation
25 regulations, which speak for themselves and are the best evidence of their content. Defendants
26 deny any characterization that is not consistent with the regulations.

1 41. The allegations in this paragraph constitute legal conclusions, to which no
2 response is required.

3 42. Defendants admit the first sentence. The remaining allegations in this paragraph
4 constitute legal conclusions, to which no response is required.

5 43. The allegations in this paragraph constitute legal conclusions, to which no
6 response is required.

7 44. The allegations in this paragraph constitute legal conclusions, to which no
8 response is required.

9 45. The allegations in this paragraph characterize the 2008 Farm Bill, which speaks
10 for itself and is the best evidence of its content. Defendants deny any characterization that is not
11 consistent with the 2008 Farm Bill.
12

13 46. The allegations in this paragraph characterize a document entitled “Lessons
14 Learned and Revisions under Consideration for APHIS’ Biotechnology Framework,” which
15 speaks for itself and is the best evidence of its content. Defendants deny any characterization
16 that is not consistent with the referenced document or the 2008 Farm Bill.
17

18 47. Defendants deny the allegations in this paragraph.

19 48. Defendants deny the first sentence and aver that sugar beets were or are being
20 grown on approximately 1.18 million acres in 2010. Defendants lack sufficient information on
21 which to either admit or deny the allegation that sugar beets have a value of \$21.1 billion
22 annually to the U.S. economy. Defendants deny the second sentence and aver that
23 approximately 30,710,000 tons of sugar beets were produced in the U.S. in 2003.
24

25 49. Defendants admit the allegations in the first sentence. Defendants deny the
26 allegations in the second sentence and aver that sugar beets are currently grown in ten states,
27 California, Colorado, Idaho, Michigan, Montana, Nebraska, North Dakota, Oregon, Washington
28

1 and Wyoming, have been grown in Ohio and Texas in the past, and account for a little more than
2 half of all refined sugar produced domestically.

3 50. Defendants deny the allegation and aver that conventional sugar beets are grown
4 in California and a related species (*Beta macrocarpa*) that could potentially cross-pollinate with
5 sugar beets also occurs there. Defendants further aver that cross pollination is unlikely because
6 sugar beets grown in California do not typically flower and produce pollen, which would be
7 necessary for cross pollination to occur. Defendants further aver that the permits issued by
8 APHIS on September 3, 2010, do not allow RRSB to be planted in California.

9
10 51. Defendants admit the allegation in the first sentence. Defendants deny the
11 remainder of the allegations in the paragraph.

12 52. Defendants admit the allegations in the first sentence. The remaining allegations
13 in this paragraph characterize the 2005 Environmental Assessment (“EA”) and Finding of No
14 Significant Impact (“FONSI”), which speak for themselves and are the best evidence of their
15 contents. Defendants deny any characterizations that not consistent with the EA and FONSI.

16
17 53. The allegations in this paragraph are legal conclusions, to which no response is
18 required.

19 54. Defendants admit that Monsanto Co. and KWS SAAT AG submitted a Petition
20 for a Determination of Nonregulated Status for Sugar Beet Genetically Engineered for Tolerance
21 to the Herbicide Glyphosate. See 69 Fed. Reg. 61466 (October 19, 2004). The remaining
22 allegations in this paragraph characterize the petition, which speaks for itself and is the best
23 evidence of its content. Defendants deny any characterizations that are not consistent with the
24 referenced petition.

25
26 55. Defendants admit that APHIS prepared an EA and FONSI in conjunction with
27 APHIS’s Determination of Nonregulated Status for Sugar Beet Genetically Engineered for
28

1 Tolerance to the Herbicide Glyphosate, see 70 Fed. Reg. 13007 (March 17, 2005). The
2 remaining allegations in this paragraph characterize the EA and FONSI, which speak for
3 themselves and are the best evidence of their content. Defendants deny any characterizations that
4 are not consistent with APHIS's 2005 EA and FONSI.

5
6 56. The allegations in this paragraph characterize Plaintiffs' complaint filed in 2008,
7 which speaks for itself and is the best evidence of its content. Defendants deny any
8 characterization that is not consistent with that complaint and also deny the allegations in that
9 complaint referenced in this paragraph.

10 57. The allegations in this paragraph characterize the Court's decisions in Center for
11 Food Safety v. Vilsack, No. C. 08-00484 JSW, 2009 WL 3047227 (N.D. Cal. Sept. 21, 2009)
12 and Center for Food Safety v. Vilsack, ___ F. Supp. 2d ___, 2010 WL 3222482 (N.D. Cal. Aug.
13 13, 2010), which speak for themselves and are the best evidence of their content. Defendants
14 deny any characterizations that are not consistent with these decisions.

15
16 58. Defendants admit that USDA issued a press release on September 1, 2010. The
17 remaining allegations in this paragraph characterize the press release, which speaks for itself and
18 is the best evidence of its content. Defendants deny any characterization that is not consistent
19 with the press release. Defendants deny the allegations in the second sentence.

20
21 59. Defendants deny the allegations in the first sentence and aver that genetically
22 engineered sugar beets could, in certain circumstances, cross-pollinate sugar beets that are not
23 genetically engineered. Defendants admit the allegations in the second sentence. Defendants
24 deny the allegations in the third sentence and aver that genetically engineered sugar beets could,
25 in certain circumstances, cross-pollinate table beets and Swiss chard.

26 60. Defendants deny the allegations in this paragraph.

27 61. Defendants deny the allegations in this paragraph.
28

- 1 62. Defendants deny the allegations in this paragraph.
- 2 63. Defendants deny the allegations in this paragraph.
- 3 64. Defendants incorporate by reference their responses to paragraphs 1-63 above.
- 4 65. Defendants deny the allegations in this paragraph.
- 5 66. Defendants deny the allegations in this paragraph.
- 6 67. Defendants deny the allegations in this paragraph.
- 7 68. Defendants deny the allegations in this paragraph and deny that any violation of
- 8 law occurred and deny that Plaintiffs are entitled to any relief whatsoever.
- 9
- 10 69. Defendants incorporate by reference their responses to paragraphs 1-68 above.
- 11 70. The allegations in this paragraph characterize CEQ's regulations implementing
- 12 NEPA, which speak for themselves and are the best evidence of their content. Defendants deny
- 13 any characterization that is not consistent with the regulations.
- 14
- 15 71. The allegations in this paragraph constitute legal conclusions, to which no
- 16 response is required. To the extent that a response is required, Defendants deny the allegations
- 17 in this paragraph.
- 18 72. The allegations in this paragraph constitute legal conclusions, to which no
- 19 response is required. To the extent that a response is required, Defendants deny the allegations
- 20 in this paragraph.
- 21
- 22 73. Defendants deny the allegations in this paragraph.
- 23 74. Defendants deny the allegations in this paragraph.
- 24 75. Defendants incorporate by reference their responses to paragraphs 1-74 above.
- 25 76. The allegations in this paragraph constitute legal conclusions, to which no
- 26 response is required.
- 27
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1 77. The allegations in this paragraph constitute legal conclusions, to which no
2 response is required.

3 78. Defendants deny the factual allegations in this paragraph and deny that any
4 violation of law occurred.

5 79. Defendants incorporate by reference their responses to paragraphs 1-78 above.

6 80. The allegations in the first sentence constitute legal conclusions, to which no
7 response is required. The remaining allegations in this paragraph characterize APHIS' NEPA
8 implementation regulations, which speak for themselves and are the best evidence of their
9 content. Defendants deny any characterization that is not consistent with the regulations.

10 81. The allegations in the first sentence constitute legal conclusions, to which no
11 response is required. The remaining allegations in this paragraph characterize APHIS'
12 regulations, which speak for themselves and are the best evidence of their content. Defendants
13 deny any characterization that is not consistent with the regulations.

14 82. The allegations in this paragraph characterize APHIS' regulations, which speak
15 for themselves and are the best evidence of their content. Defendants deny any characterization
16 that is not consistent with the regulations and deny any violation of the statute or regulations.

17 83. Defendants deny the factual allegations in this paragraph and deny that any
18 violation of law occurred.

19 84. Defendants incorporate herein by reference their responses to paragraphs 1-83
20 above.

21 85. Defendants deny the allegations in this paragraph.

22 86. Defendants deny the allegations in this paragraph.

23 87. Defendants deny the factual allegations in this paragraph and deny that any
24 violation of law occurred.

1 The remainder of the Complaint consists of Plaintiffs' Prayer for Relief, to which no
2 response is required, but in the event that a response is deemed required, Defendants deny that
3 Plaintiffs are entitled to the relief requested or to any relief whatsoever.

4 GENERAL DENIAL

5 Defendants deny any allegations of the Complaint, whether express or implied, that are
6 not expressly admitted, denied, or qualified herein.

7 AFFIRMATIVE DEFENSES

- 8
- 9 1. The Complaint fails to state a claim on which relief can be granted.
 - 10 2. The Court lacks jurisdiction over the Complaint because Plaintiffs lack standing.
 - 11 3. The Court lacks jurisdiction over some of Plaintiffs' claims because Plaintiffs are
12 not challenging a final agency action or are challenging action committed to agency discretion by
13 law.
 - 14 4. The Complaint should be dismissed because venue is improper.
 - 15 5. Some of Plaintiffs' claims are barred by the doctrine of waiver.
 - 16 6. Some of Plaintiffs' claims are barred because Plaintiffs failed to exhaust their
17 administrative remedies.
 - 18 7. Some of Plaintiffs' claims are barred by estoppel.

19 Wherefore, Defendants respectfully pray that this Court deny in all respects Plaintiffs'
20 Prayer for Relief, dismiss the Complaint, enter judgment for Defendants, and grant such other
21 relief as may be appropriate.

22 Respectfully submitted this 3rd day of December, 2010.

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25 IGNACIA S. MORENO
26 Assistant Attorney General

27 /s/ Luther L. Hajek
28 LUTHER L. HAJEK
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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2010 I electronically filed the foregoing DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system, which will automatically send e-mail notification to the following attorneys of record:

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